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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RANDALL HOLL,
Plaintiff,
v.
UNITED PARCEL SERVICE, INC.,
Defendant.

Case No.16-cv-05856-HSG

**SUPPLEMENTAL ORDER
ADDRESSING PLAINTIFF'S PETITION
FOR A WRIT OF MANDAMUS**

Re: Dkt. No. 49

The Court enters this supplemental order in response to the May 24, 2018 order of the United States Court of Appeals for the Ninth Circuit. *See* Dkt. No. 49.

I. BACKGROUND

In October 2016, Plaintiff Randall Holl filed a putative class action complaint against Defendant United Parcel Service, Inc. *See* Dkt. No. 1. The complaint alleges that Defendant violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 13708(b), and asserts federal and state law unjust enrichment claims. *Id.* In December 2016, Defendant filed a motion to compel arbitration and stay the litigation. Dkt. No. 23. Defendant’s motion sought only a stay, not a dismissal. *Id.* at 16 (“Upon compelling arbitration, the Court should stay this action, consistent with Section 3 of the FAA.”). Plaintiff’s opposition on this point was limited to a footnote on the last page of his brief, in which he cited authority from this Circuit recognizing that “courts have discretion under [Section 3] to dismiss claims that are subject to an arbitration agreement.” Dkt. No. 29 at 24 n.30. Plaintiff then simply asserted that “[i]f this Court grants UPS’s motion, dismissal is the appropriate remedy,” without explaining why. *Id.* In its reply, Defendant restated its request for a stay, and did not respond to the request for dismissal. Dkt. No. 32 at 15 (asking the Court to

1 “compel Plaintiff to arbitrate his claims, as he agreed to do, . . . and stay the proceedings while the
2 parties pursue arbitration”). The Court granted Defendant’s motion to compel arbitration and stay
3 the case. Dkt. No. 41.

4 Plaintiff then sought leave to file a motion for reconsideration, arguing that the Court
5 should have dismissed the case instead of staying it. *See* Dkt. No. 42 at 3. Alternatively, Plaintiff
6 contended that the Court should certify the matter for interlocutory review under 28 U.S.C. §
7 1292(b). *See id.* Defendant opposed the request for certification. Dkt. No. 44 at 1. As to the
8 request for dismissal, Defendant responded, without further elaboration, that “if the Court is
9 inclined to permit Plaintiff to pursue an immediate appeal, UPS does not oppose Plaintiff’s request
10 that the Court modify its Order for the limited purpose of dismissing rather than staying this case.”
11 *Id.* The Court denied the motion for leave, noting that if Plaintiff wished to expedite the appellate
12 process, he could voluntarily dismiss his action under Federal Rule of Civil Procedure 41(a)(2).
13 Dkt. No. 46 at 2.

14 Plaintiff now has filed a petition for a writ of mandamus. *See* Dkt. No. 47. On May 24,
15 2018, the Ninth Circuit determined that Plaintiff’s petition raised issues warranting an answer.
16 Dkt. No. 49 at 1. In addition to directing Defendant to file an answer, the Ninth Circuit provided
17 this Court the opportunity to address the petition if it wished to do so. *Id.*

18 **II. DISCUSSION**

19 Plaintiff “seeks a writ of mandamus directing the district court to vacate its order
20 compelling arbitration and enter an order denying defendant United Parcel Service, Inc.’s motion
21 to compel arbitration.” Pet. for Writ of Mandamus to the U.S. Dist. Court for the N. Dist. of Cal.
22 (“Pet.”), at 1, *In re: Randall Holl*, No. 18-70568 (9th Cir. Feb. 28, 2018). Plaintiff casts the issue
23 presented as “[w]hether the district court correctly applied the rules of contract formation when it
24 concluded that an agreement to arbitrate existed between the parties.” *See id.* On this substantive
25 question, the Court has nothing to add to its order granting Defendant’s motion to compel
26 arbitration. But the Court does wish to respond to Plaintiff’s assertions that (1) the Court’s
27 exercise of its discretion to stay rather than dismiss the case was based on an “incorrect[]” reading
28 of the law, Pet. at 11, and (2) the Court’s statement “that a party challenging an order compelling

1 arbitration and staying the action may proceed immediately to a direct appeal by simply
2 dismissing his claims under Rule 41 . . . is legally incorrect,” *id.* at 12 n.3.

3 As to the first point, the Court’s order denying leave to seek reconsideration, which cited
4 *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014), did not make a “claim.” *See*
5 Pet. at 11. Instead, it quoted, verbatim, binding circuit precedent. *See* Dkt. No. 46 at 1. Plaintiff
6 does not argue that the Court inaccurately quoted *Nguyen*, or that *Nguyen* in turn inaccurately cited
7 Section 3 of the FAA. *See* 763 F.3d at 1175. In any event, the Court recognized that dismissal
8 could be granted as a matter of discretion, but found that Plaintiff failed to show any manifest
9 failure to consider his argument (raised in passing in a footnote at the very end of his opposition
10 brief) so as to warrant reconsideration. *See* Dkt. No. 46 at 1-2. The Court’s order compelling
11 arbitration was unambiguous, and granted the precise relief that the moving party had requested: a
12 stay. *See Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1153 and n.1 (9th Cir. 2004)
13 (urging district courts “to be as clear as possible about whether they truly intend to dismiss an
14 action or mean to grant a stay,” and noting that “[u]nnecessary delay of the arbitral process
15 through appellate review is disfavored”) (citation omitted). The Court thus found that Plaintiff
16 failed to meet his burden of showing that reconsideration was warranted under this district’s local
17 rules.

18 As to the second point, the Court submits that a close reading of Plaintiff’s footnote 21,
19 and the cases cited in it, does not establish that the statement that Plaintiff could have voluntarily
20 dismissed his case if he wanted to appeal immediately was “legally incorrect.” Pet. at 12 n.3 and
21 29 n.21. The Ninth Circuit has “repeatedly recognized that voluntary dismissals with prejudice
22 that produce an adverse final judgment may be appealed.” *Ward v. Apple Inc.*, 791 F.3d 1041,
23 1045 (9th Cir. 2015) (citing authorities); *see also Romoland Sch. Dist. v. Inland Empire Energy*
24 *Ctr.*, 548 F.3d 738, 748 (9th Cir. 2008) (reasoning “that allowing appeal of voluntary dismissals
25 with prejudice is not likely to undermine our normal appellate practice by encouraging a flow of
26 appeals that are quasi-interlocutory in nature”) (citation and internal quotations marks omitted).

27 In 2017, the Supreme Court stated a different rule applicable to orders denying class
28 certification, holding that “[p]laintiffs in putative class actions cannot transform a tentative

1 interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their
2 claims with prejudice—subject, no less, to the right to ‘revive’ those claims if the denial of class
3 certification is reversed on appeal.” *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017)
4 (internal citations omitted). Plaintiff asserts that lower courts have “uniformly applied” the
5 principles set forth in *Baker* “in the arbitration context, holding that litigants may not directly
6 appeal an otherwise non-reviewable interlocutory order compelling arbitration by voluntarily
7 dismissing their own claims.” See Pet. at 29 n.21. In support of that definitive assertion, he cites a
8 single unpublished Second Circuit case. That case, *Bynum v. Maplebear Inc.*, 698 F. App’x 23, 24
9 (2d Cir. 2017), held that plaintiffs “cannot circumvent” the FAA’s prohibition against appeal of an
10 order granting a motion to compel arbitration and staying proceedings “by agreeing to dismiss
11 their claims rather than proceed to arbitration.” *Bynum* in turn relied on a published Second
12 Circuit case, *Katz v. Cellco Partnership*, 794 F.3d 341 (2d Cir. 2015), which Plaintiff does not cite
13 in the Petition.¹ See 698 F. App’x at 24. A review of *Katz* makes clear that these cases followed a
14 rule that simply does not apply in the Ninth Circuit.

15 In *Katz*, the district court granted a motion to compel arbitration and dismissed the action,
16 rather than staying it. 794 F.3d at 344. The Second Circuit explained that the question of
17 “whether district courts retain the discretion to dismiss an action after all claims have been
18 referred to arbitration, or whether they must stay proceedings, remains unsettled.” *Id.* The court
19 noted that the “Courts of Appeals are about evenly divided” on this question, with several circuits
20 holding or implying “that a stay must be entered,” while others—including the Ninth Circuit—
21 “have suggested that the district courts enjoy the discretion to dismiss the action.” *Id.* at 345
22 (citing authorities). The Second Circuit “join[ed] those Circuits that consider a stay of
23 proceedings necessary after all claims have been referred to arbitration and a stay requested.” *Id.*
24 Accordingly, in *Katz*, the Second Circuit interpreted the FAA to “explicitly den[y] the right to an
25 immediate appeal from an interlocutory order that compels arbitration or stays proceedings.” *Id.*
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¹ Plaintiff did not cite *Bynum* or *Katz* in any of its filings in this Court. See Dkt. No. 29
28 (opposition to Defendant’s motion to compel); Dkt. No. 42 (motion for leave to seek
reconsideration).

1 at 346 (citing 9 U.S.C. § 16(b)(1)-(2)); *see also id.* (“The dismissal of an arbitrable matter that
2 properly should have been stayed effectively converts an otherwise-unappealable interlocutory
3 stay order into an appealable final dismissal order.”).

4 But of course *this* Circuit has held that courts *do* have discretion under Section 3 to dismiss
5 claims that are subject to an arbitration agreement. *Sparling v. Hoffman Constr. Co.*, 864 F.2d
6 635, 638 (9th Cir. 1988)); *see also Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne*
7 *Pharma (USA) Inc.*, 560 F.3d 935, 940 (9th Cir. 2009) (“If the court finds that an arbitration
8 clause is valid and enforceable, the court should stay or dismiss the action to allow the arbitration
9 to proceed.”) (citation omitted); *MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4, 9 (9th Cir. 2014)
10 (articulating this Circuit’s “preference for staying an action pending arbitration rather than
11 dismissing it”).²

12 Plaintiff’s claim that *Bynum* establishes that he could not voluntarily dismiss his case in
13 order to immediately appeal the Court’s order granting the motion to compel arbitration thus
14 ignores the circuit split described in *Katz*. The holdings in *Bynum* and *Katz* were based on the
15 Second Circuit’s finding that Section 3 mandates imposition of a stay, and prohibits dismissal.
16 This Court sees nothing in those cases establishing that it was “legally incorrect” to point out that
17 Plaintiff had the option of voluntarily dismissing his lawsuit under the law of *this* Circuit. Indeed,
18 it remains unclear to the Court why Plaintiff so adamantly wanted the *Court* to dismiss his case
19 (even though Defendant never sought that remedy), but now argues that he would be prejudiced if
20 he *chose* to dismiss the case to facilitate an immediate appeal. *Bynum* cannot answer that
21 question, for the reasons explained above, and Plaintiff provides no other support for his
22 categorical assertion that “[l]ower courts have uniformly . . . [held] that litigants may not directly
23 appeal an otherwise non-reviewable interlocutory order compelling arbitration by voluntarily
24 dismissing their own claims.” *See Pet.* at 29 n.21.

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27 ² The *MediVas* court noted in a footnote that a dismissal allowing immediate appeal “might be
28 appropriate” “when the practical realities of arbitration and litigation suggest either that no
arbitration will actually take place or that the arbitration will be so different in character as to
make staying the original action useless.” 741 F.3d at n.4. Plaintiff did not cite *MediVas* in any of
his filings in this Court. *See Dkt. Nos. 29 and 42.*

1 The Clerk is directed to serve a copy of this Supplemental Order on the United States
2 Court of Appeals for the Ninth Circuit.

3 **IT IS SO ORDERED.**

4 Dated: 6/7/2018

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7 HAYWOOD S. GILLIAM, JR.
8 United States District Judge

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